1990

Sam H. Bennion v. ANR Production Company, a Delaware corporation and the Utah State Board of Oil, Gas and Mining, an agency of the State of Utah : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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SAM H. BENNION,	:	
Appellant,	:	Case No. 900473
vs.	:	
ANR PRODUCTION COMPANY, a Delaware corporation and the UTAH STATE BOARD OF OIL, GAS & MINING, an agency of the State of Utah,	:	Priority 15
Appellees.	:	

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RESPONDENT ANR PRODUCTION COMPANY'S BRIEF

APPEAL FROM AN ORDER OF THE UTAH STATE BOARD OF OIL, GAS & MINING

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

CASES:

II. JURISDICTION OF THE SUPREME COURT

The Utah Supreme Court has exclusive jurisdiction of an appeal from an order of the Board of Oil, Gas and Mining pursuant to Utah Code Ann. § 78-2-2(3)(e)(iv)(Supp. 1990).

III. DEFINITION OF TERMS

This brief will make repeated reference to the following pleadings, transcripts, names, statutes, parties, wells, orders, and certain oil and gas terms:

"Act" or "Forced Pooling Statute" is the Oil and Gas Conservation Act, Utah Code Ann. § 40-6-6 (1988) (Addendum D), which mandates forced pooling and nonconsent penalties, and which allows more than one well to be producing in a drilling unit;

"Altamont/Bluebell Field" is an oil and gas field in Duchesne and Uintah Counties, Utah, which has been spaced for 640 acre drilling units for the Lower Green River/Wasatch Formations;

"ANR" is ANR Production Company, the Petitioner below and the Appellee or Respondent on appeal;

"Bennion" is Sam H. Bennion, the Respondent below and the Appellant or Petitioner on appeal;

The "Board" is the Board of Oil, Gas and Mining, of the Utah Division of Oil, Gas and Mining;

"consenting parties" means those companies or parties who elect to invest money in the drilling of an oil and gas well and who have the right to drill such an oil and gas well pursuant

to their ownership of an oil and gas lease or unleased mineral interest.

"Drilling Unit" is the drilling (spacing) unit established for Section 1, Township 2 South, Range 5 West, Uintah Special Meridian, Duchesne County, Utah, an irregular section containing 678.2 acres;

"Index" followed by a page number shall refer to the Index of Record as filed with this Court;

"Miles Well" is the Miles 2-1B5 Well located in the Drilling Unit and is the increased density well (the second well) drilled on the Drilling Unit;

"nonconsenting parties" are those companies or individuals who do not elect to invest money in the drilling of an oil and gas well even though they have the right to drill such an oil and gas well pursuant to their ownership of an oil and gas lease or unleased mineral interest.

"nonconsent penalty" means the percentage of the nonconsenting parties' share of costs that the consenting parties may recover out of the nonconsenting parties' share of oil and gas produced from a well. A 100% nonconsent penalty means that the consenting parties may recover from production only the nonconsenting parties' share of costs. A 175% nonconsent penalty means that the consenting parties may recover from production the nonconsenting parties' share of the costs plus an additional 75% of those costs.

"Order" is the order of the Board in Docket No. 90-021, Cause 139-63 (Addendum A), dated September 20, 1990, which is the subject of this appeal;

"1981 Order" is the order of the Board in Cause 139-13 (Addendum B), dated April 30, 1981, which force pooled the Drilling Unit;

"1985 Order" is the order of the Board in Docket No. 85-007, Cause No. 139-42 (Addendum C), dated April 17, 1985, which allowed for two producing wells in each drilling unit in the Altamont/Bluebell Field;

"Tew Well" is the Tew 1-1B5 Well located in the Drilling Unit and is the first well drilled on the Drilling Unit;

"TR" followed by a page reference shall refer to the transcript of the hearing held before the Board on May 24, 1990;

"1985 TR" is the transcript of the hearing before the Board on the issue of increased density (reflected in the 1985 Order);

IV. STATEMENT OF THE ISSUES

A. Is Utah Code Ann. § 40-6-6 (1988), constitutional in that it authorizes the Board to issue orders allowing consenting owners to recoup from production of oil and gas attributable to nonconsenting owners 150% to 200% of drilling and completion costs?

While this issue may be one of first impression by this Court, similar statutes have been upheld in other jurisdictions

as a legitimate exercise of the police powers of the state to bring to pass the objectives of the various states to (i) prevent waste, and (ii) to protect the correlative rights of all of the mineral interest owners within a designated drilling unit. See for example the Syllabus by the Court in Anderson v. Corporation Commission, 327 P.2d 699 (Okla. 1958), where the Oklahoma Supreme Court said:

> A statute authorizing the Corporation Commission to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among owners of the leasehold interest of the oil and gas underlying their land, and to fairly distribute among them, the costs of production and of the apportionment is a proper exercise of the police power and does not violate the provisions of the State or Federal Constitutions. Id. at 700.

B. Was Utah Code Ann. § 40-6-6 (1988), properly applied by the Board in its order allowing ANR, the operator of the Miles Well and the other nonconsenting parties, to recoup 175% of Bennion's share of the drilling and completion costs?

The Order is fair and reasonable as applied to Bennion. Other parties in the drilling unit who were signatories to the Joint Operating Agreement ("JOA"), had contractually obligated themselves to be subject to a 300% nonconsent penalty in the event they chose not to participate in the Miles Well. In addition, the nonconsenting parties under the JOA did not receive a royalty until payout was achieved. Bennion, on the other hand, receives a royalty equal to average royalty being paid to other

land owners in the Drilling Unit who have leased their mineral interest (at least 1/8th of production), and, upon payout from production of 1.75 times of his share of the drilling and completion costs, he will participate at 8/8ths of his interest in the Drilling Unit, subject only to paying his proportionate share of the ongoing costs of production. The 175% nonconsent penalty is not only fair, it is much more favorable to Bennion than to anyone else holding interests in the section.

C. Does the Board have the authority to amend its orders from time to time as circumstances change?

Utah Code Ann. § 40-6-6 (1988), provides in part:

> (2) *The Board may modify the order* to provide an exception to the authorized location of a well when the Board finds such a modification to be reasonably necessary.
>
> (3) An order establishing drilling units for a pool shall cover all lands determined by the Board to be underlain by the pool, and *the order may be modified by the Board* to include additional areas determined to be underlain by the pool.
>
> (4) . . . *The Board may modify the order* to decrease or increase the size of drilling units or permit additional wells to be drilled within the established units.

(Emphasis added.)

Between the time of the 1981 Order and the hearing in this matter on May 24, 1990, the Act was amended in 1983 and the Board had issued an order affecting this and other lands in the Altamont/Bluebell Field allowing for two producing wells in each

drilling unit (1985 Order). Clearly, the Board had the authority to amend the 1981 Order.

D. Did ANR have an obligation to petition the Board for the right to drill the Miles Well?

The 1985 Order provides:

> C. Additional wells may be drilled *at the option of the operator of the unit*, based upon geologic and engineering data for that unit which will justify the drilling of an additional well in order to recover additional oil, provided the additional well appears to be economically feasible.

(Emphasis added.)

The Transcript of the hearing for the 1985 Order makes it clear that Board does not want to be in the business of reviewing drilling applications on the basis of economic factors every time a second well is drilled within an existing unit.

> CHAIRMAN WILLIAMS: We tried to incorporate what we think is the existing condition now, which is a prudent operator standard. (1985 TR, page 258).

This is not to suggest that applications for permits to drill are no longer filed for administrative approval to the Utah Department of Natural Resources. The Board, however, felt that all else being equal, an application for a permit to drill a second well should not be treated any differently than the application for the first well, and would not require Board approval.

E. Should the Court accept the findings of fact of the Board of Oil, Gas and Mining as being supported by "substantial evidence when viewed in light of the whole record before the Court"?

The standard of appellate review is set forth in the Administrative Procedures Act, Utah Code Ann. §§ 63-46b-1 to 22 (1989). Section 63-46b-16(4) states:

> (4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:
>
> . . .;
>
> (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
> . . . .

F. Should the Court should give deference to the conclusions of the Board based on the Board's findings of facts, that Bennion be subject to a 175% nonconsent penalty in the Drilling Unit?

The Administrative Procedures Act has been reviewed by the Court most recently in the case of First National Bank of Boston v. County Board of Equalization of Salt Lake County, 799 P.2d 1163 (1990), where "substantial evidence" under Utah Code Ann. § 63-46b-16(4)(g) was defined as ". . . that quantum and quality of relevant evidence that is adequate to convince a

reasonable mind to support a conclusion." 799 P.2d 1163, 1165. See also Grace Drilling v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989).

V. STATEMENT OF THE CASE

A. Nature of the Case.

Utah Code Ann. § 40-6-6 (1988), authorizes the Board to impose a nonconsent penalty of (i) 100% of the costs of the surface equipment beyond the wellhead, (ii) 100% of the operating costs since the date of first production, and (iii) 150% to 200% of the drilling and completion costs to be recouped from production of those parties who do not participate financially in the drilling of an oil well. This case is simply to determine if a mineral interest owner, who doesn't lease his land and who otherwise has not consented to the proposed well, is subject to the nonconsent penalty.

B. Course of Proceedings and Disposition Below. ANR filed a Request For Agency Action with the Board on April 10, 1990, seeking an order specifying the percentage of costs to be recovered by all consenting owners of the Miles Well before Bennion, as a nonconsenting owner, is entitled to receive his share of production. The Board, after considering all of the evidence offered at a hearing in the matter on May 24, 1990, and after reviewing briefs submitted the parties, ordered, on August 23, 1990, that prior to Bennion being able to receive proceeds from the Miles Well other than a royalty, the consenting owners

must recover from his share of the production, (i) 100% of the costs of the surface equipment beyond the wellhead, (ii) 100% of the operating costs since the date of first production, and (iii) 175% the drilling and completion costs of the Miles Well (hereinafter called a "175% nonconsent penalty). The Order was later reduced to writing on September 20, 1990. On October 12, 1990, Bennion filed a Petition for Review of Administrative Action with this Court.

VI. SUMMARY OF ARGUMENTS

A. Utah Code Ann. § 40-6-6 (1988), is constitutional because it is a legitimate exercise of the State of Utah's police power to "foster, encourage, and promote the development, production and utilization" of Utah's oil and gas resources. By imposing nonconsent penalties within the Drilling Unit, the Board, under the Act, is preventing waste and protecting the correlative rights of all of the mineral interest owners.

B. The Act has been constitutionally applied in this case by the Board since the consenting parties are recouping a fair and reasonable amount from Bennion's share of the production which is less than from any other lessor or working interest owner in the Drilling Unit. He has not been singled out by the Board or the operator, ANR, for special treatment.

C. It was appropriate for the Board to amend the 1981 Order. The Board has the authority under the Act to amend its orders as circumstances change. The changes of the Act in 1983,

the Order of the Board in 1985, and the proposal to drill the Miles Well in 1990 have made the 1981 Order obsolete in defining the relationship among the interest owners in the Drilling Unit. Also, Bennion, through his actions, has waived his claim that the 1981 Order cannot be amended.

D. There is nothing in the 1985 Order which would have required or even allowed ANR to petition the Board for the right to drill the Miles Well. The 1985 Order made it clear that the decision to drill a second well was up to the operator.

E. The Court should not disturb the findings of the Board since the findings were adequately supported by the record. Appellant has not made reference to any portion of the record below to support Bennion's contention that the Board had an inadequate basis for its findings. The legal conclusion of the Board that Bennion should be subject to the 175% nonconsent penalty is based on findings of the Board which were sufficient as a matter of law to make its legal conclusions. The Board consists of highly qualified members who have experience in oil and gas matters. The Court should give weight to the expertise of the Board in reviewing its findings.

VII. ARGUMENT

A. THE FORCED POOLING STATUTE IS CONSTITUTIONAL.

The Supreme Court of the United States in Hunter Co. v. McHugh, 320 U.S. 222, 64 S.Ct. 19, held that:

> . . . a state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landowners of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment.

Id. at 21.

While this issue may be one of first impression by this Court, similar statutes have been upheld in other jurisdictions as a legitimate exercise of the police powers of the state to bring to pass the objectives of the various states to (i) prevent waste, and (ii) to protect the correlative rights of all of the mineral interest owners within a designated drilling unit. "The constitutionality of compulsory pooling statutes has been sustained so generally that no reasonable question on this score remains." H. WILLIAMS AND C. MEYERS, OIL AND GAS LAW §905.1 (1990 Edition).

The case of Anderson v. Corporation Commission, 327 P.2d 699 (Okla. 1958), is a good example of legal authority upholding statutes which regulate the creation and participation in drilling units for oil and gas. In Anderson, the court was asked to pass on the constitutionality of an Oklahoma statute which required a mineral interest owner to accept a bonus payment (set by the commission) if he chose not participate in the drilling of the unit well. Upon receipt of the bonus, the mineral interest owner forfeits any further working interest or right to participate in the unit. In reaching its holding that the

statute was a constitutional exercise of police power, the court reviewed the public policy and the balancing of interests which it felt supported the state action.

> To curtail over-production and waste for the benefit and protection of the general public, restraints had to be placed around the individual's rights to develop and produce beyond the demand or need. The only logical method of restraint, other than limitation of production per well, was the curtailment of drilling by exercise of the police power. There evolved the well spacing laws. But, with well spacing alone, the object of curtailment was met, although often at the expense of serious inequalities and inequities between the various mineral owners and lessees. . . . Thus consideration of the correlative rights of such owners and lessees became a necessary part of the legislation. The results were the acts authorizing unitization and pooling in each common source of supply in order that the exercise of the police power in the conservation of natural resources would not effect too serious an unbalancing of correlative rights.

Id. at 701.

The issue in the Anderson case is not any different than the constitutional issue raised by Bennion. Both ANR and Bennion had to give up something in order to get something. ANR has to pay Bennion's share of costs and to share proceeds from the Miles Well in return for being allowed to drill an additional well on the Drilling Unit. Bennion has to be subject to a modest nonconsent penalty in return for receiving a royalty and standing on the sideline and watching the well go down at no cost or risk to him. As the court in Anderson observed:

> All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals. The infliction of such loss is not a deprivation of property without due process of law; the exertion of police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law.

Id. at 702 (quoting from Lombardo v. City of Dallas, 73 S.W.2d 475, 478).

The Forced Pooling Statute in Utah is much more favorable to the nonconsenting landowner than the Oklahoma statute. Bennion does not lose his right to his working interest in the Drilling Unit for all time. If the Oklahoma statute has withstood constitutional attack, the Utah Act should also be found to pass constitutional muster.

In addition to Oklahoma, other state courts have found that a state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among mineral property owners. See Hunter v. Justice's Court of Centinela Tp., 223 P.2d 465 (Calif. 1950), and Sylvania Corporation v. Kilborne, 271 N.E.2d 524 (N.Y. 1971).

The purpose of a nonconsent penalty is to balance the risks and benefits of drilling an oil and gas well between the parties agreeing to invest substantial sums of money in drilling an oil and gas well and the parties that refuse to invest any money. The parties that agree to pay for the cost of drilling a

well face real risks that they may not make any money on their investment. In fact, they may not recover part or all of their investment. A well may be a dry hole, the cost of drilling may exceed all expectations, production may be insufficient to pay the cost of the well or prices may drop.

The parties that do not agree to invest their money do not face these risks. If the well is dry, the nonconsenting parties do not pay a penny. If the well is productive they will claim a substantial benefit by having a producing well on their property.

There is a large incentive for a party to become a nonconsenting party if there is no nonconsent penalty. There is also a large incentive for a party to refuse to agree to pay another party's share of the cost of drilling a well if there is no nonconsent penalty. By drilling a well the consenting parties are bestowing a potentially valuable asset on the nonconsenting party at a risk to themselves but at no risk to the nonconsenting party. Without a nonconsent penalty a nonconsenting party would receive all of the benefits of the drilling of the well and face none of the risks. The nonconsent penalty is one method of balancing the risks and benefits of drilling the well.

The Utah Legislature has examined the issue of consenting and nonconsenting parties and enacted a statute, the Forced Pooling Statute, that balances the risks and benefits of drilling a well between the consenting and nonconsenting parties.

Under the Forced Pooling Statute the consenting parties are obligated to pay all of the cost of drilling the well including the costs attributable to the nonconsenting parties' interests. The nonconsenting parties are not liable for any portion of the cost of drilling a well. If the well is successful, and only if the well is successful, then the consenting parties may begin to recoup the costs attributable to the nonconsenting parties' interests from the production attributable to such interests. The consenting parties are required to pay the nonconsenting parties a royalty equal to the average royalty in the unit until the nonconsent penalty is paid out. To remove the disincentive to drilling that the consenting parties face by having to pay the nonconsenting parties' share of the costs, the Utah Legislature has mandated that the consenting parties be allowed to recover from production (i) 100% of the costs of the surface equipment beyond the wellhead, (ii) 100% of the operating costs since the date of first production, and (iii) 150% to 200% of the drilling and completion costs. To compensate them, the nonconsenting parties receive a royalty, plus they are entitled to have the benefit of a well once the nonconsent penalty is recovered from production.

This recovery allowed by the Forced Pooling Statute is commonly referred to as a nonconsent penalty. It should be noted that a 100% nonconsent penalty would only allow the consenting parties to recover out of production 100% of the costs

attributable to the nonconsenting parties. A 175% nonconsent penalty allows the consenting parties to recover out of production such costs, plus 75% of such costs as compensation for agreeing to pay for the costs of the well. The practice in industry usually calls for nonconsent penalties ranging from 200 to 300 percent for development wells, at least 300 percent for most exploratory (wildcat) wells, and in very expensive areas, particularly offshore operations, as much as 1,000 percent. MANUAL OF OIL AND GAS TERMS, WILLIAMS AND MEYERS (6th Edition, 1984).

It should also be noted that the nonconsenting parties do not "pay" for the cost of the well in any traditional sense of the word. The nonconsenting parties are not required to pay any cash or write a check. If the well is not productive then the nonconsenting parties are not liable for any of the drilling costs. If the well is productive then the consenting parties are entitled to receive the production attributable to the nonconsenting parties' interests until they recoup the nonconsenting parties' share of such costs. The nonconsenting parties do receive a royalty.

Bennion's claims that he must "pay" a 175% penalty are somewhat misleading. Bennion's claim that he would have to pay 175% of his costs and receive nothing if the well is not productive enough, (Bennion Brief at 14), is incorrect for two reasons. First, Bennion's nonconsent penalty is recovered only

out of production. If the well is not productive enough to allow the consenting owners to recover the full 175% penalty, then Bennion will not have to "pay" any portion of the remainder of the 175% penalty. Second, Bennion is paid a royalty if there is any production. In addition, Bennion's claim that his nonconsent penalty is higher than anyone else's (Bennion Brief at 13) is also incorrect. Mr. Dave Laramie testified that in excess of three companies elected not to participate in the Miles Well and those companies would be subject to a 300% nonconsent penalty. (TR, page 22).

On balance, the Forced Pooling Statute is a legitimate exercise of the State's police power to regulate the production of oil and gas in Utah. The correlative rights of Bennion and ANR and the other consenting parties are being protected, and the State's interests in the conservation and prevention of waste are being served.

B. THE NONCONSENT PENALTY ALLOWED UNDER THE ACT IS CONSTITUTIONAL AS APPLIED IN THIS CASE.

It is difficult to understand Bennion's claim that his circumstances are so unique that the nonconsent penalty is unconstitutional as applied to him. If a nonconsent penalty is constitutional on its face then Bennion must show that the statute has been applied in an unconstitutional manner.

Bennion appears to assert that since he had a vested property right then it is unconstitutional to impose a nonconsent

penalty. Every mineral leasehold owner and unleased mineral interest owner in a unit, however, has a vested property right. If the nonconsent penalty is constitutional then every time it is imposed it will affect the rights of parties with vested property rights. The mere fact that Bennion has a vested property right does not mean that he cannot be made subject to a nonconsent penalty. Bennion has not made any showing or claimed that his vested property rights are different from any other unleased mineral interest owner's property rights. If a nonconsent penalty can be constitutionally imposed, then it can be constitutionally imposed upon Bennion in this case.

Bennion's claim that the 175% nonconsent penalty is unconstitutional because it is unreasonable is really a claim that there was no risk in drilling the Miles Well. In making this assertion, Bennion mischaracterized a case and omitted any reference to evidence that supports the Board's decision.

The amount of the risk involved in drilling the Miles Well is a question of fact. The Board made a finding of fact as to the amount of risk that was involved in drilling the Miles Well. The Board found "there is sufficient evidence of risk incurred by the consenting owner that a penalty of 175% is appropriate" (Order at 10). As stated in Section E of the Arguments of this brief, if there is substantial evidence to support this finding of fact, then a reviewing court may not find to the contrary. This finding of fact that there was enough risk

to impose a 175% nonconsent penalty is supported by substantial evidence in the record. Bennion has failed to point to any evidence in the record to indicate that a 175% nonconsent penalty is unreasonable except that the risk of drilling a dry hole is low and that there is not an uneconomic well on the Drilling Unit. David M. Laramie testified at length about the risks involved in drilling the Miles Well. These included (1) the risk of price fluctuations (TR, page 17); (2) the possibility of a blowout (TR, page 30); (3) mechanical problems may develop, such as casing failure (TR, page 30); (4) three other companies had elected not to participate in the drilling of the Miles Well (TR, page 22); (5) the risk that the Miles Well could turn out to be uneconomic (TR, page 29); and (6) drilling a well to 14,000 feet is always risky (TR, page 30).

There is no evidence in the record to contradict this testimony. Bennion put on no evidence to refute or contradict this testimony (Order at 4). Bennion spends a great deal of his brief arguing that the risk of drilling a dry hole is very small. The risk of drilling a dry hole is only one of many risks that confronts an operator. A dry hole is "a completed well which is not productive of oil and/or gas (or which is not productive of oil and/or gas in paying quantities)" MANUAL OF OIL AND GAS TERMS, H. WILLIAMS AND G. MEYERS, Sixth Edition (1984) at 255. Even if the risk of drilling a dry hole is small, the risk of drilling an uneconomic well is still significant. Similarly, the

fact that there is not an uneconomic well on the Drilling Unit is also only one factor in deciding the risk of drilling the Miles Well. The fact that the Tew Well is an economical well does not guarantee that the Miles Well will be an economical well.

Mr. Laramie testified that the cost of a well in the Altamont/Bluebell Field was in the neighborhood of $1.75 to 2 million (TR, page 15). A well that is not a dry hole may produce insufficient oil and gas to pay for itself. If a well costs $2 million, but only produces $1 million worth of oil, it is clearly not a dry hole but on the other hand, it is certainly not an economic well.

Any investment to drill a well is risky. The well may not produce as much as expected, the price of oil may drop, the well may blow out and many other unforeseen events may occur. The parties investing in the well are agreeing to pay for the cost of drilling the well, regardless of the success of the well. These parties do not have any guarantee that they will ever recover their money and have taken a large risk in drilling the Miles Well.

Bennion has not assumed any portion of this risk. Bennion is not liable for any of the costs of the well out of his pocket. The costs of drilling attributable to his share will not be paid by Bennion, but will be paid by the consenting parties. If the Miles Well is successful, then the consenting parties will be able to recover these costs out of production. If the Miles

Well produces less than enough oil to pay for itself, Bennion would receive substantial royalties while the consenting parties would have lost money.

There is substantial evidence to support the Board's finding that a 175% nonconsent penalty is reasonable in this case. The nonconsent penalty has been applied in a constitutional fashion.

Before leaving this section, ANR must note that Bennion's characterization of the case of Windsor Gas Corp. v. Railroad Commission of Texas, 529 S.W.2d 834 (Tex. Civ. App. 1975) is misleading and contains incorrect statements. The Texas Railroad Commission regulates the oil and gas industry in Texas. The Texas Railroad Commission is authorized under the Texas Mineral Interest Pooling Act, Tex. Nat. Res. Code Ann. §§102.001 et seq. (Vernon 1978), to force pool certain interests if a "fair and reasonable offer to voluntarily pool" is made before the force pooling application is made. In Windsor, the offer made by Windsor to voluntary pool included a proposal to drill eight (8) wells on a take it or leave it basis. Wilson, the party Windsor was attempting to force pool, could either agree to pay for all eight (8) wells or be subject to a 2 to 1 (i.e 200%) nonconsent penalty on all eight (8) wells. The Texas Railroad Commission dismissed Windsor's applications for force pooling since a fair and reasonable offer to voluntarily pool was not made to Wilson. The Court affirmed the Texas Railroad's refusal to enter a force

pooling order. It did not invalidate a force pooling order as stated in Bennion's Brief (Bennion's Brief at 17). Nor did the Court of Appeals state that any part of its decision rested upon the fact that the operators were not taking any risks in drilling the wells as stated in Bennion's Brief (Bennion's Brief at page 17). The Court of Civil Appeals did recite testimony that drilling in the area had an 84.6% percent success rate. This implies that more than one out of eight wells were not successful which is certainly not risk free. Finally, the Court of Civil Appeals did not hold that a Forced Pooling Order with a 2 to 1 risk factor was not fair and reasonable as stated in Bennion's Brief (Bennion's Brief at page 17). The court actually held "that appellant's offer for the initial drilling of eight drilling units on a 'take it all' or 'leave it all' basis, and with a two-to-one risk factor, was not a 'fair and reasonable offer to voluntarily pool'" (Windsor at 837).

C. THE BOARD WAS CORRECT IN MODIFYING THE ORIGINAL POOLING ORDER.

1. Board Has The Authority Under The Act To Amend Pooling Orders.

The administrative mandate given to the Board by the Utah Legislature ranges from the very broad (Utah Code Ann. § 40-6-5(1), "The board has jurisdiction over all persons and property necessary to enforce this chapter" and Utah Code Ann. § 40-6-5(3)(a), "The board has the authority to regulate: (a) all

operations for and related to the production of oil or gas....") to the very specific (Utah Code Ann. § 40-6-6(5), "The board may enter an order pooling all interests in the drilling unit for the development and operation"). Unquestionably, Utah's Forced Pooling Statute authorizes the Board to pool involuntarily the unleased mineral interest of Bennion with the working interests of the other owners in the drilling unit.

The following examples in the Act demonstrate that the need to modify orders is an integral part of the Board's responsibility in carrying our its mandate to conserve and regulate the production of oil and gas in the State of Utah.Utah Code Ann. § 40-6-6 (1988), provides in part that:

> (2) *The Board may modify the order* to provide an exception to the authorized location of a well when the board finds such a modification to be reasonably necessary.
>
> (3) An order establishing drilling units for a pool shall cover all lands determined by the board to be underlaid by the pool, and *the order may be modified by the Board* to include additional areas determined to be underlaid by the pool.
>
> (4) . . . *The Board may modify the order* to decrease or increase the size of drilling units or permit additional wells to be drilled within the established units.

(Emphasis added.)

Between the time of the original 1981 Order dated April 30, 1981, and the hearing in this matter on May 24, 1990, the Act had been amended (1983) and the Board had issued the 1985 Order

affecting this and other lands in the Altamont/Bluebell Field allowing for two producing wells in each drilling unit. In order to enforce the mandatory nonconsent penalty contained in the Act, the Board had to modify the 1981 Order. Clearly, the Board had the authority to amend the 1981 Order.

Just as the Board has the legislative authority to formulate a compulsory pooling order, the Board must also have the authority to amend or otherwise modify its forced pooling orders. To decide to the contrary would force the Board into the untenable position of having to decide once and for all time all matters that could affect the pooled unit, even when circumstances could change dramatically. In this case, the circumstances and conditions under which the 1981 Order was entered have changed. The statute has changed to allow the Board to authorize more than one well on a spacing unit. The Board may also increase or decrease the size of a spacing unit. The body of geologic and production knowledge in the Altamont/Bluebell Field has expanded. We now know that one well will not drain the 640-acre drilling unit established under the existing pooling order, and the Board has expressly so found. 1985 Order at 5. The 1985 Order has now authorized the drilling of a second production well in a drilling unit. Id. at 8. Certainly, these changes are significant. ANR cannot imagine how changes of the nature contemplated by the general rule could be more significant

than those in this matter or be more worthy of meriting an amendment of the existing order.

Although the Utah courts have not ruled on the issue, other oil and gas producing state courts have resoundingly endorsed the authority of an administrative agency charged with the regulation of the oil and gas industry to change or modify its orders. Railroad Commission v. Aluminum Co. of America, 380 S.W.2d 599 (Tex. 1964) at 602:

> the Commission's power to regulate oil and gas production in the interest of conservation and protection of correlative rights is a continuing one and its orders are subject to change or modification where conditions have changed materially, new and unforseen problems arise or mistakes are discovered.

See also, Vierson v. Bennett, 353 P.2d 114, 118-119 (Okla. 1960); Spiers v. Magnolia Petroleum Co., 206 Okla. 510, 244 P.2d 852 (1951); see generally, 6 H. WILLIAMS AND C. MEYERS, OIL AND GAS LAW, § 947 (1989); 1 B. KRAMER AND P. MARTIN, THE LAW OF POOLING AND UNITIZATION, § 14.01, et seq., (3d. Ed. 1990).

In analyzing Bennion's arguments in support of his claim that the Board cannot amend an order because he has a vested right in the Drilling Unit it becomes clear that Bennion has confused the issue of a vested property right and the obligation to pay his share of the drilling cost. In modifying the Original Pooling Order the Board has not divested Bennion of any property rights. Bennion still owns his mineral interest and

has the right to receive his just share of production. The only thing that has changed is the pooling order now contains a provision on how Bennion's share of the cost of drilling the Miles Well is to be paid.

It should be remembered that the Original Pooling Order did not address the drilling of future wells. It did not, as required by statute, provide for a nonconsent penalty if a party elected not to participate in a future well. The Board just did not foresee in 1981 that an additional well would be drilled.

Bennion's reliance upon the Oklahoma cases holding a pooling order pools the entire unit and not the wellbore is misplaced. The Utah Forced Pooling Statutes and the Oklahoma Forced Pooling Statutes are completely different. In Oklahoma, a party can lose the right to participate in the entire unit for all time if he does not participate and pay his share of the costs of the first well on the unit.

The Pooling Order in Inexco Oil Co. v. Oklahoma Corp. Commission, 767 P.2d 404 (Ok. 1988) required:

> the owners to either participate by paying their share of the costs of drilling and completing the well or elect to accept a bonus. The owners could accept a cash bonus of $1,250 per acre plus an overriding or excess royalty of 1/16 of 8/8, or a non-cash bonus of an overriding or excess royalty of 1/8 of 8/8. Id. at 405.

In Amoco Production v. Corp. Commission of Oklahoma 751 P.2d 203 (Ok. App. 1986) ("Amoco I") the nonconsenting owner was required

to farmout its interest and retain a 1/8th of 8/8ths excess royalty, when it did not elect to participate in the initial well. Id. at 205.

This was also the case in Amoco Production v. Corp. Commission of Oklahoma, 752 P.2d 835 (Ok. App. 1987) ("Amoco II"). The pooling order provided:

> for an election by the owners of interests in the drilling and spacing unit. The owners could either elect to participate in the working interests in the unit well, or elect to accept a cash bonus plus an override in lieu of participation. Id. at 836.

This election of keeping a working interest and paying the cost of drilling or giving up the working interest and receiving only an overriding royalty interest was also described in Helmerich & Payne, Inc. v. Corp. Commission of Oklahoma, 532 P.2d 419 (Ok. 1975). The pooling order provided:

> that the sum of $30.00 per acre or no cash bonus but an override of 1/16 of 7/8 on oil and 1/8 of 7/8 on gas is hereby fixed as a fair and reasonable bonus to be paid any party whose interest is pooled herein in lieu of his right to participate in the working interest of any and all unit wells in which he has an interest.

Id. at 420.

and that

> In the event any owner of an outstanding leasehold estate does not desire to participate in the development of the nine-section area, he shall be awarded a bonus, either in cash or in overriding royalty, as set out above, in lieu thereof; and he shall be required to elect within 15 days from the

> date of this Order whether he desires to accept the bonus herein established for all his interests in any and all of the nine drilling and spacing units, and the type of bonus he elects to receive, or whether he desires to participate in the development program under one of the alternatives set out above.

Id. at 420-21.

The issue in each of these cases (except Helmerich & Payne) was whether the election of converting one's interest from a working interest to a royalty interest applied only to the first well or the entire unit. Each court which faced the issue held that the order provided that the election was on a unit-wide basis and by electing not to participate in the initial well, then nonconsenting party, in essence, conveyed their working interest in the unit and reserved a royalty interest in the unit.

The Utah Forced Pooling Statute is dramatically different from the Oklahoma forced pooling statute. In Utah when an unleased mineral interest owner, such as Bennion, elects not to participate in the drilling of a well, then he will be paid a royalty until the consenting parties recover the nonconsent penalty. At that point, he is entitled to participate in the well and the drilling unit as a working interest owner.

In this case, the Tew Well paid out in May, 1976, prior to Bennion's interest in the Tew Well being force pooled. Bennion v. Utah State Board of Oil, Gas and Mining, 675 P.2d 1135 (Utah 1983). Bennion has participated in the Tew Well and the

Drilling Unit as an unleased mineral interest owner. When the Miles Well was proposed Bennion could have elected to participate as an unleased mineral interest owner. He did not elect to do so. TR, pages 14-15.

The issue before the Board and this Court is whether Bennion is required to be subject to a nonconsent penalty since he elected not to pay his share of drilling costs. It is not an issue of whether or not he owns an unleased mineral interest in the unit. That is not in dispute.

The Forced Pooling Statute mandates that a pooling order provide for a nonconsent penalty. "The order shall provide that each consenting owner shall be entitled to receive . . . his proportionate part of the nonconsenting owner's share of such production until costs are recovered as provided in this subsection", Utah Code Ann. § 40-6-6 (6) (1988), which costs include the nonconsent penalty. To the extent that the 1981 Order does not include a nonconsent penalty then it is in violation of this provision.

The only issue that the Oklahoma cases raise is whether the nonconsent penalty should be recovered from the production from the unit or whether it should be recovered from production on a well by well basis. The Order provides that it is to be recovered on a well by well basis. The Forced Pooling Statute itself is not as clear as it could be. It references recovering

costs out of "the well" and "the unit." See Utah Code Ann. § 40-6-6(6).

ANR believes that by applying the nonconsent penalty to each well separately, then the rights of the nonconsenting owner in the first well will be protected. By determining that the costs of drilling the second well can only be collected from production from the second well, then the nonconsenting owner will continue to receive revenues from the first well. If it were unit wide, Bennion would cease to recover revenues from the Tew Well until the Miles Well paid out.

This Court had the chance to interpret a prior version of this statute in a different fact situation in Bennion v. Gulf Oil Corp., 716 P.2d 267 (Utah 1985). That case involved a second well but arose prior to the 1985 Order which allowed two wells to be produced at one time. Gulf drilled the first well on the unit that had been forced pooled. Bennion owned an unleased mineral interest in the unit. Gulf drilled a second well, shut-in the first well and attempted to charge Bennion, as a nonconsenting mineral interest owner, his share of the cost of drilling the second well. This Court held that a nonconsenting owner's rights in the first well should not be trampled by the drilling of a second well.

That decision is not applicable in this case, since the Board has been given the authority to allow a second well to be drilled. The Board's discretion in allowing the costs to be

recovered only from the Miles Well, instead of both of the Wells, is supported by the reasoning of that case in protecting the rights of the owners in the first well. If the Court orders that the nonconsent penalty can only be applied on a unit wide basis, then Bennion will receive decreased revenues from the Tew Well until the Miles Well pays out.

2. Bennion Has Waived His Claim That A Pooling Order Cannot Be Amended.

Bennion has waived his claim that the Forced Pooling Order may not be modified and a new nonconsent penalty cannot be imposed by claiming rights under the Forced Pooling Statute that are not included in the 1981 Order.

The 1977 version of the Forced Pooling Statute provided:

> a nonconsenting owner of a tract in a drilling unit, which is not subject to any lease or other contract for the development thereof for oil and gas, shall be deemed to have a basic landowners' royalty of *1/8, or 12-1/2%*, of the production allocated to such tract.

Utah Code Ann. § 40-6-6(h) (1977) [emphasis added].

The 1983 version of the Forced Pooling Statute requires that a forced pooling order provide that:

> A nonconsenting owner of a tract in a drilling unit, which is not subject to a lease or other contract for the development of oil and gas, shall receive as a royalty *the average landowners royalty* attributable to each tract within the drilling unit,

> determined prior to the commencement of drilling and payable from the production allocated to each tract until the consenting owners have recovered the costs as provided in Subsection (6)."

Utah Code Ann. § 40-6-6(7)(b) (1988) [emphasis added].

Since the Tew Well had been drilled and had paid out when the Forced Pooling Order was entered in 1981, the 1981 Order did not include a provision for the payment of royalties in the future. The only reference to royalty was a calculation of "Royalty Interest Accumulations" which were stated to be "Based on a one-eighth cost free royalty, proportionately reduced, until payout. Upon payout this royalty merges with and is included in the working interest." (1981 Order at 5). The 1981 Order also provides that Shell shall pay Bennion interest on "Bennion's statutory royalty." (1981 Order at 7). There is no provision in the 1981 Order to pay royalties in the future.

Even though the 1981 Order did not specifically provide for royalty payments in the future and stated that the royalty merged with the working interest when pay out occurred in 1976, Bennion demanded and claimed that he is entitled by statute to a royalty. In the hearing in May, 1990, the following statements were made:

> MR. LARAMIE: Yes. If Mr. Bennion would have agreed to participate in the well based on actual costs, he would have had to pay about $60,000. Under the statute, he will still be paid a royalty interest based on the average royalty in the field. He will not receive

> nothing until the well is paid out, but he will have received a royalty rate based on an average of the royalty paid in the field.
>
> MR. McINTYRE: Is there any way you can give me a figure on that?
>
> MR. LARAMIE: Yes, it would be about 13.89 percent.
>
> MR. STIRBA: But, remember, just so it's clear, that's statutorily mandated, and that's only one-eighth, or in this case, what--a percentage of his share that he's otherwise entitled to. (TR at page 62).

Mr. Stirba, who was representing Bennion at the hearing, was asserting that Bennion was entitled to receive a royalty based upon the statute and not the 1981 Order. It is not clear whether he was claiming a 1/8 royalty or a 13.89% royalty. In either case, he was claiming a right under the statute that was not included in the 1981 Order.

In essence, what Bennion is claiming in his appeal is that ANR is not entitled to receive a nonconsent penalty for financing the Miles Well which is "statutorily mandated" since the 1981 Order did not contain a specific provision providing for future nonconsent penalties. On the other hand, Bennion is claiming a royalty even though the 1981 Order does not contain a provision for the payment of royalty. Bennion is making this claim, not because of any provision of the 1981 Order or a future amendment of the 1981 Order, but because it is contained in the Forced Pooling Statute.

Bennion has, in essence, admitted that the 1981 Order should be and can be amended to include the payment of royalties

until payout based upon the statute. At the same time he is claiming that the 1981 Order cannot be amended to provide for a nonconsent penalty since it does not benefit him. He cannot have it both ways; by his actions, Bennion has waived his claim that the 1981 Order cannot be amended.

3. The Board's Order Is Consistent With The Declaration Of Public Interest.

The Board's Order protects the correlative rights of all owners and is consistent with the Declaration of Public Interest. Utah Code Ann. § 40-6-1 provides:

> It is declared to be in the public interest to foster, encourage, and promote the development, production and utilization of natural resources of oil and gas in the state of Utah in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be obtained and that the correlative rights of all owners may be fully protected.

As discussed previously, the legislature specified in Utah Code Ann. § 40-6-6 how the correlative rights of both the consenting and nonconsenting parties are to be protected when a well is drilled. The legislature concluded that if a party would not agree to pay its share of the cost of drilling a well, then the consenting party should be compensated for the additional risk. The legislature mandated that the nonconsenting party, in return for having a well drilled on its behalf by the consenting

owners, shall be subject to a nonconsent penalty of 150 to 200 percent.

Bennion's argument is essentially that the application of the provisions of the statute implementing the Declaration of Public Interest violates the Declaration of Public Interest. Bennion's and ANR's correlative rights are being protected as required by statute. A well has been drilled at no risk to Bennion. Bennion is receiving his share of revenues from the Tew Well without deduction for the costs of the Miles Well. Bennion is receiving royalties from the Miles Well. Bennion will not be liable for any of the costs of drilling the Miles Well except out of production. ANR and the other consenting owners have invested substantial sums of money and may or may or may not recover those investments and are entitled by statute to a nonconsent penalty.

The Declaration of Public Interest requires the protection of all owners not just Bennion. The protection of all correlative rights in accordance with the provisions of the Forced Pooling Statute does not violate the Declaration of Public Trust.

D. THE 1985 ORDER DOES NOT REQUIRE NOR ALLOW ANR TO PETITION THE BOARD FOR THE RIGHT TO DRILL THE MILES WELL.

The 1985 Order does not require any evidence of economic feasibility to be presented to the Board and does not require the Board to make a determination that the second well be

economically feasible prior to its drilling. Sections C and D of the 1985 Order provide:

> C. Additional wells may be drilled *at the option of the operator* of the unit, based upon geologic and engineering data for that unit which will justify the drilling of an additional well in order to recover additional oil, provided the additional well appears to be economically feasible.
>
> D. Economically feasible means that a prudent operator would have a reasonable opportunity to recover the costs of drilling, completing, producing and operating the well, plus a reasonable profit.

[Emphasis added.]

There is no requirement that evidence of economic feasibility be presented to the Board. There is no requirement that the Board make a determination of economic feasibility prior to the drilling a second well. In fact, there is nothing in the Order to base Bennion's argument upon. Bennion, in fact, had to fabricate out of thin air an alleged quotation to begin his argument.

Bennion's brief at page 34 contains the following quotation: "An additional well could be drilled at the option of the operator provided the well appears to be economically feasible." [emphasis omitted]. This sentence does not appear in the 1985 Order, nor does it appear in the Order entered by the Board in Docket No. 90-021, Cause No. 139-63 which is being

appealed by Bennion. Fabricated statements cannot be the basis of an appeal.

A reading of what the 1985 Order actually states shows that "Additional wells may be drilled at the *option of the operator of the unit*" (Section C, 1985 Order) [emphasis added] and not the determination of the Board.

The requirement that the Board review the economic feasibility of every second well would be a major departure from the Board's prior practice. The economic feasibility of first wells are not reviewed by the Board. The economic feasibility of replacement wells are not reviewed by the Board. If the Board had intended to require operators to appear before the Board and convince the Board that a second well was economically feasible before it could be drilled, it would have clearly stated such requirement.

In fact, if the Board had intended to make such a requirement it would have enforced its own order. The Court can take judicial notice of the fact that numerous second wells have been drilled under the 1985 Order and the board has not required any operator to supply evidence of economic feasibility. In this case, the Board knew that the Miles Well was spudded prior to the hearing (See Order Finding of Facts 8 and 9), yet did not require ANR to cease operations or furnish evidence of economic

feasibility. The Operator is to determine if he desires to drill an additional well.

ANR respectfully requests this Court to take judicial notice of the transcript in Docket No. 85-007, Cause No. 139-42 in which the Board entered the 1985 Order. A review of the transcript from Docket No. 85-007, Cause No. 139-42, shows that the intent of Sections C and D of the 1985 Order was to protect the Operator from being forced to drill uneconomic wells while preventing the Operator from escaping its duty under the implied covenant to develop contained in typical oil and gas leases. The application to drill additional wells was intended to encourage but not require additional drilling (1985 TR, page 14). Frank Douglas, the attorney for ANR and the other petitioners in the 1985 hearing, argued that the operator should be left with the decision to drill a second well and not the Board or another party (1985 TR, pages 21-23, 34-36). ANR presented testimony that the parties that can make the best decision to drill or not to drill a second well are the operator and the parties who invest money in the well. (1985 TR, pages 126, 162-163, 185) The Board's staff expressed concern about leaving the decision to drill a second well solely with the Operator, but supported the proposed order if it contained language which would make clear that the order would define economic feasibility and not modify the traditional lessor/lessee relationship (1985 TR, pages 21, 237).

Bow Valley Petroleum, Koch Exploration Company, Sonat Exploration Company and Phillips Petroleum also expressed concerns that the Operator should make the decision to drill a second well (1985 TR, pages 38-39, 217-18, 238-43).

In closing arguments Mr. Pruitt, attorney for ANR and the other petitioners, stated:

> The petition is to allow additional wells without the necessity of coming before the Board on an individual well by well basis to drill each additional well. That's never been desirable, and we want to keep that foremost in your mind as you consider this matter. The concern that has been expressed by numerous parties, operators, and nonoperators and royalty owners alike seems to focus really on the nonexercise of the option, or perhaps a way in which to force an operator to drill a certain well out of order or to drill a well of questionable merit (1985 TR, page 251).

To implement this, ANR and the other petitioners offered to amend their proposed order. Mr. Pruitt read some of these provisions which included:

> "(C) Additional wells may be drilled at the option of the operator of the unit based upon geologic and engineering data for that unit which will justify the drilling of an additional well in order to recover additional oil, provided the additional well appears to be economically and geologically feasible in the judgment of the operator.
>
> "(D) Economically feasible means that the operator has a reasonable opportunity to recover the costs of drilling, completing, producing, and operating the well, plus a reasonable profit."

(1985 TR, at pages 254-55) [emphasis in original].

The final 1985 Order changed the proposed phrase "provided the additional well appears to be economically and geologically feasible in the judgment of the operator" to "provided the additional well appears to be economically feasible."

A discussion on this change occurred between Hugh Garner, attorney for Coastal Oil & Gas Corporation, and Chairman Williams, as follows:

> MR. GARNER: It strikes me that we should, instead of basing it solely on the economic, we should bring into it both the geologic and the engineering aspect.
>
> CHAIRMAN WILLIAMS: Which paragraph are you referring to?
>
> MR. GARNER: I'm looking at paragraph (c) on page 7. The language has been limited by saying, "appears to be economically feasible."
>
> CHAIRMAN WILLIAMS: Our reason for that change is because we did not want to get into the business of singling out components of an economic determination.
>
> It seems to me that there are several components, and we wanted to leave those as they are without appearing to be selecting from among them. So we thought that we were making it broader, leaving it an open--a true economic determination based on all factors, including geologic factors.
>
> MR. GARNER: Are we still looking at this in terms of the judgment of the operators? I see that language has been struck also.

> CHAIRMAN WILLIAMS: *We tried to incorporate what we think is the existing condition now*, which is a prudent operator standard.
>
> *I think it is in the judgment of the operator,* but his judgment has to be sound and not arbitrary. That was what we were doing with paragraph (d). We changed the concept. We stated it in a different fashion. (1985 TR, page 258) [emphasis added].

The Board intended that the determination to drill a second well be the same as it was for the first well i.e. the prudent operator test. The prudent operator standard is the test for determining if an operator or lessee has breached an implied covenant such as the implied covenant of reasonable development. MANUAL OF OIL AND GAS TERMS, WILLIAMS AND MEYERS, Sixth Edition (1984).

If an operator wants to drill a well he decides if it will be economic. The Operator does not need to obtain a determination from the Board that the well is economic. On the other hand, if an operator refuses to drill a well and a lessor can show that the operator is in breach of its implied covenant to develop, then the 1985 Order does not protect the operator for its failure to drill.

E. THE COURT SHOULD NOT DISTURB THE BOARD'S FINDINGS OF FACT BECAUSE THE RECORD SUPPORTS THOSE FINDINGS.

1. The Standard for Review is "Substantial Evidence.

This Court recently established standards to be utilized in the review of findings of fact and conclusions of law by the an administrative agency. In First National Bank of

Boston v. County Board of Equalization of Salt Lake County, 799 P.2D 1163 (1990), the Court stated that the Administrative Procedures Act, Utah Code Ann. §§ 63-46b-1 to 22 (1989), requires the

> . . . appellate court to review the "whole record" to determine whether the agency's action is "supported by substantial evidence." "Substantial evidence" is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. See *Consolo v. FMC*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026-27, 16 L.Ed.2d 131 (1966); *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 715 P.2d 927, 930-31 (1985); *Grace Drilling v. Board of Review*, 776 P.2d 63, 68 (Utah Ct.App. 1989). An appellate court applying the "substantial evidence test" must consider both the evidence that supports the Tax Commission's factual findings and the evidence that detracts from the findings. Nevertheless, the party challenging the findings--in this case, the taxpayer--must marshal all of the evidence supporting the findings and show that despite the supporting facts, the Tax Commission's findings are not supported by substantial evidence.

799 P.2d 1163, 1165 [certain citations in footnotes included].

Assuming that the Act is constitutional and that the Board had the authority to amend its orders, the case before the Court becomes a review of factual determinations made by the Board which led to the legal conclusion that an imposition of a 175% nonconsent penalty is fair to all parties, and that such a finding is consistent with the purposes of the Act.

2. The Review of Evidence is not a Trial de Novo. In reviewing the findings of the Board, the Court should not substitute its own conclusions it might have reached had it been the original trier of fact. In Grace Drilling v. Board of Review, 776 P.2d 63, 68 (Utah Ct.App. 1989), the court said:

> In undertaking such a review, this court will not substitute its judgment as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review. [Citations omitted]. It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences.

776 P.2d 63, 68.

F. THE COURT SHOULD GIVE DEFERENCE TO THE BOARD'S LEGAL CONCLUSIONS BASED ON ITS FINDINGS OF FACTS.

1. The Board's Expertise is Needed to Make the Findings in this Case.

In First National Bank of Boston v. County Board of Equalization of Salt Lake County, supra, the Court recognized that the expertise of the administrative agencies must be considered by the appellate court. The expertise, however, must be applied in a manner consistent with the agency's legislative mandate.

> Although it is a "universally recognized rule" that this court must "take some cognizance of the expertise of the agency in its particular field and accordingly to give some deference to its determination," *Utah Power & Light Co. v. State Tax Comm'n,* 590

> P.2d 332, 335 (Utah 1979), the agency's decision must rest upon some sound evidentiary basis, not a creation of fiat.

Hurley v. Board of Review of Indus. Comm'n, 767 P.2d 524, 526-27 (Utah 1988); Utah Power & Light, 590 P.2d at 335; 799 P.2d 1163, 1166 [footnotes included].

The Utah State Legislature has empowered the Board under the Forced Pooling Statute to establish drilling units and to set, when appropriate, levels of nonconsent penalties. In reaching its findings, the Board heard extensive testimony, examined exhibits submitted by the parties, and heard arguments of counsel from both parties. Based on these factors, the Board made factual findings and conclusions of law, which rested on a "sound evidentiary basis." See also Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601 (Utah 1983), where this Court said:

> In reviewing decisions such as these, a court should afford great deference to the technical expertise or more extensive experience of the responsible agency.

658 P.2d 601, 610.

Because of the experience of the Board and its understanding of the complexities of drilling and pooling orders, we would urge this Court to give deference to the Board's findings which have been amply supported by the record. The members of the Board come from a cross section of interests and backgrounds. Utah Code Ann. § 40-6-4(2) provides:

> 2. The board shall then consist of seven members appointed by the governor, with the advice and consent of the Senate. No more than four members shall be from the same political party. The members shall have the following qualifications:
>
> (a) two members knowledgeable in mining matters;
>
> (b) two members knowledgeable in oil and gas matters;
>
> (c) one member knowledgeable in ecological and environmental matters;
>
> (d) one member who is a private land owner, owns a mineral or royalty interest and is knowledgeable in those interests; and
>
> (e) one member who is knowledgeable in geological matters.

Each of these individuals has been chosen to give the Board the necessary breadth of experience to review natural resource matters.

2. The Board's Legal Conclusion was Supported by the Record as a Whole.

In the case of Utah Department of Administrative Services v. Public Service Commission, supra, the Court explained that factual questions sometimes lead to determinations of "special law", which, by their very nature, require the expertise of the agency empowered by the legislature to make such

decisions. The Court in reviewing such findings of special laws, held that considerable weight should be given to such findings.

> Also among these intermediate issues are the Commission's decisions on what can be called questions of "special law." These are the Commission's interpretations of the operative provisions of the statutory law it is empowered to administer, especially those generalized terms that bespeak a legislative intent to delegate their interpretation to the responsible agency. In reviewing agency decisions of this type, we apply what we have called the "time honored rule of law . . . that the construction of statutes by governmental agencies charged with their administration should be given considerable weight . . . ."

658 P.2d 601, at page 610 (citing McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977); West Jordan v. Department of Employment Security, 656 P.2d 411 (Utah 1982).

Because of the extensive record in this matter, there was sufficient evidence to support the findings of fact and the conclusions of law contained in the Order of the Board, and the Court should give "considerable weight" to the Board's interpretation of the Forced Pooling Statute.

VIII. CONCLUSION

The issues which have been raised in this appeal have involved significant constitutional matters. Bennion's brief has largely failed to demonstrate through the citation of applicable case law any constitutional basis for attacking the Forced Pooling Statute. Nor has he marshalled the evidence from the

record to support his contentions that the board acted inappropriately in making its Order.

The Forced Pooling Statute is constitutional. It is a fair and reasonable application of the state's police power. It has also been implemented in this case in a fair and reasonable way by the Board. The Board's Order enforcing the mandatory provisions of the Forced Pooling Statute should be upheld. We urge the Court to deny Bennion's appeal.

DATED February 21, 1991.

RAY, QUINNEY & NEBEKER

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CERTIFICATE OF SERVICE

I hereby certify that I duly mailed a true and correct copy of the foregoing RESPONDENT ANR PRODUCTION COMPANY'S BRIEF, postage prepaid, this 22nd day of February, 1991, to the following:

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IN THE UTAH SUPREME COURT

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SAM H. BENNION,	:	
Appellant,	:	Case No. 900473
vs.	:	
ANR PRODUCTION COMPANY, a Delaware corporation and the UTAH STATE BOARD OF OIL, GAS & MINING, an agency of the State of Utah,	:	Priority 15
Appellees.	:	

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ADDENDUM TO RESPONDENT ANR PRODUCTION COMPANY'S BRIEF

APPEAL FROM AN ORDER OF THE UTAH STATE BOARD OF OIL, GAS & MINING

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Exhibit A to Addendum

BEFORE THE BOARD OF OIL, GAS AND MINING

DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR AGENCY ACTION OF ANR PRODUCTION COMPANY FOR AN ORDER SPECIFYING COSTS TO BE PAID BY S.H. BENNION AS A NON-CONSENTING OWNER UNDER FORCED POOLING ORDER COVERING SECTION 1, TOWNSHIP 2 SOUTH, RANGE 5W-USM, DUCHESNE COUNTY, UTAH	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER DOCKET NO. 90-021 CAUSE NO. 139-63

Pursuant to the Request for Agency Action of ANR Production Company (ANR), this cause was initially heard before the Board of Oil, Gas and Mining, Department of Natural Resources, on Thursday, May 24, 1990, at 10:00 a.m. in the Boardroom of the Division of Oil, Gas and Mining, 355 West North Temple, 3 Triad Center, Suite 301, Salt Lake City, Utah.

At the hearing of May 24, 1990, arguments of the parties were heard. The following Board members were present at the hearing:

James W. Carter, Acting Chairman
Richard B. Larsen
Judy F. Lever
E. Steele McIntyre
Kent G. Stringham
Chairman Gregory P. Williams having recused himself, as well as board member John M. Garr

The Board was represented by Alan S. Bachman, Esq., Assistant Attorney General for the State of Utah.

Appearances for the Division for Oil, Gas and Mining were made by Dianne Nielson, Director, Oil, Gas and Mining, and Ronald J. Firth, Associate Director, Oil and Gas, and John R. Baza, Petroleum Engineer.

ANR was represented by John Harrington, Esq., and David M. Laraime, Sr. Landman. Bennion was represented by Peter Stirba, Esq.

The Board took the matter under advisement and requested legal counsel from the Office of the Attorney General of the State of Utah.

On or about June 26, 1990, the Secretary of the Board transmitted to Petitioner, Respondent's counsel and the Division of Oil, Gas and Mining the list of six issues with respect to which the Board wished further legal briefing. On July 25, 1990, after receiving leave to file Amicus Curiae, Rocky Mountain Oil and Gas Association (RMOGA) filed a Brief and Response to the questions presented by the Board of Oil, Gas and Mining on June 21, 1990. The parties Briefs have been considered by the Board. On August 23, 1990, pursuant to notice, a continuation of the original hearing was held in the Boardroom of the Division of Oil, Gas and Mining, 355 West North Temple, 3 Triad Center, Suite

301, Salt Lake City, Utah. The following Board members were present:

James W. Carter, Acting Chairman
Richard B. Larsen
Judy F. Lever
E. Steele McIntyre
Kent G. Stringham

Chairman Gregory P. Williams having recused himself, as well as board member John M. Garr.

The Board was represented by Thomas A. Mitchell, Esq., Assistant Attorney General for the State of Utah.

Appearances for the Division for Oil, Gas and Mining were made by Ronald J. Firth, Associate Director, Oil and Gas. Neither the Petitioners nor Respondent were present.

NOW THEREFORE, the Board, having considered the testimony adduced and the exhibits reviewed in all said hearings and being fully advised in the premises, now makes and enters the following:

FINDINGS OF FACT

1. Due and regular notice of the time, place and purpose of the May 24, 1990 hearing was given to all interested parties as required by law and the rules and regulations of the Board. ANR put on evidence regarding the cost of drilling to date and the estimated costs of drilling to completion of the Miles 2-1B5 well. Further, ANR presented testimony and other evidence of its position concerning the risk incurred by the consenting interest owners in the drilling of the Miles 2-1B5

well. S.H. Bennion, through counsel, argued the legal points set forth in his written response, but submitted no evidence in rebuttal to ANR's evidence concerning risk of drilling on the Miles 2-1B5 well. The cause was continued by the Board and further argument in the form of briefs to specific questions of the Board has been provided by counsel and Amicus Curiae. This cause was heard again on August 23, 1990, with due and regular notice of the time, place and purpose of the hearing having been given to all interested parties as required by law and the rules of the Board.

2. The Board has jurisdiction over the subject matter, of the Request for Agency Action and over all parties interested therein and has jurisdiction to make and promulgate the order hereinafter set forth.

3. The Request for Agency Action in this matter is a request to modify the order in Cause No. 139-13, specifying the percentage of costs to be recovered by all consenting owners of the Miles 2-1B5 well, Section 1, Township 2 South, Range 5 West, USM, Duchesne County, Utah, (hereinafter "Miles 2-1B5 well"). The order in Cause No. 139-13 dated April 30, 1981, and effective July 26, 1979, force pooled the drilling unit created by the order of this Board in Cause No. 139-3.

Specifically the Request for Agency Action sought relief as follows:

(a) That the consenting owners of the the Miles 2-1B5 well be reimbursed for S.H. Bennion's share, a non-consenting mineral interest owner, of the costs out of production from the unit attributable to S.H. Bennion's interests;

(b) That the consenting owners of the Miles 2-1B5 well own and be entitled to receive all production from the Miles 2-1B5 well applicable to each tract or interest and obligations payable out of production until the consenting owners have been paid the amount due under the terms of the modified order relating to the subject drilling unit;

(c) That each consenting owner of the Miles 2-1B5 well be entitled to receive, subject to royalty or similar obligations, the share of the Miles 2-1B5 well applicable to its interest in the separate drilling units and unless the consenting owners agreed otherwise, its proportionate part of S.H. Bennion's share of such production until costs are recovered;

(d) That Bennion be entitled to receive, subject to royalty or similar obligations, the share of the production from the Miles 2-1B5 well applicable to S.H. Bennion's interest in the subject drilling unit after the consenting interest owners recover from S.H. Bennion's share of production the following:

(i) 100% of the non-consenting owner's share of the costs of service equipment beyond the wellhead connections, plus 100% of the non-consenting owner's

share of the cost of operation of the well commencing with the first production and continuing until the consenting owners have recovered these costs; and

(ii) 200% of that portion of the costs and expenses of staking the location, well-site preparation, rights of way, rigging up, drilling, reworking, deepening, or plugging back, testing, completing, and the cost of equipment in the well, after deducting any cash contributions received by the consenting owner;

(iii) Interest charged in the amount of the prime lending rate as periodically determined by Citibank of New York, N.A., plus two percentage points.

(e) That S.H. Bennion's ownership result in S.H. Bennion receiving as a royalty, the average landowner's royalty attributable to each tract within the subject drilling unit, determined prior to the commencement of drilling, and payable from the production allocated to each tract until the consenting owners recovered the cost described in paragraphs (d), (i), (ii), and (iii) set forth above.

4. The Board's previously entered order in Cause No. 139-13 force pooled all interests in the subject drilling unit, finding, inter alia, that S.H. Bennion was the record owner of an unleased, undivided, one-fourth mineral interest in all oil, gas

and minerals located in the northeast quarter, southwest quarter, and northwest quarter, southeast quarter, of Section 1, Township 2 South, Range 5 West, Uinta Special Meridian, Duchesne County, Utah. Further, the order held that Shell Oil Company, the majority working interest owner and the sole operator of the subject drilling unit, was willing to allow S.H. Bennion to share in the proceeds of production of that unit from first production in the Tew No. 1-1B5 well (hereinafter "Tew 1-1B5") as the designated production well capable of producing oil and gas in commercial quantities in the subject drilling unit. The order made no findings concerning the sharing of costs between consenting and non-consenting owners.

5. This original forced pooling order and S.H. Bennion's interest in the pooling unit as set forth in the Cause No. 139-13 was determined prior to amendments to the forced pooling statute in 1977. Section 40-6-6 (6), Utah Code Ann.

6. On August 1, 1986, Petitioner ANR succeeded to the interest of Shell Oil Company in the subject drilling unit and took over operation of the Tew 1-1B5 effective December 1, 1986.

7. Effective July 1983, the Utah Legislature repealed the then existing Oil and Gas Conservation Act and enacted a new statute. On April 12, 1985, this Board as enpowered by the 1983 Legislature entered its order in Cause No. 139-42 authorizing the drilling and simultaneous production of two wells from each

drilling unit in the Greater Altamont-Bluebell-Cedar Rim-Sink Area in which Section 1 the subject drilling unit and wells are located.

8. On February 6, 1990, ANR commenced the Miles 2-1B5 well in Section 1 as the increased density second well in Section 1.

9. On May 24, 1990, arguments of the parties in this cause and matter were heard and ANR put on evidence regarding the cost of drilling to date, the estimated costs of drilling to completion and the basis for its requests for a 200% non-consent penalty. S.H. Bennion put on no evidence in rebuttal.

10. On June 21, 1990, the Board submitted questions to the parties for further briefing.

11. The Board in reviewing its order in Cause No. 139-13 determines that there has been a substantial change in circumstances since the entry of that order. The Board finds that the change in statutory authority authorizing the drilling and simultaneous production of more than one well in the subject drilling unit, the geological and economic evidence supporting its order in Cause No. 139-42 and the subsequent February 6, 1990 commencement of the Miles 2-1B5 well as an increased density well in the subject drilling unit, constitute changes in circumstances sufficient to support modification of its order in Cause No. 139-13.

12. Additionally, the Board in reviewing its order in Cause No. 139-13 determines that the order is silent as to the rights of consenting and non-consenting interest owners under the pooling order concerning reimbursement for costs out of production and share of production. The Board therefore finds that regulation of operations in this forced pooling unit must be modified and supplemented upon terms that are just and reasonable.

13. The Board finds that the Oil and Gas Conservation Act of 1983, 1983 Utah Laws Chapter 205 provides the applicable statutory grounds on which to base its modified order. The Board finds that all critical facts before the Board concerning this Request for Agency Action occurred after the 1983 legislation was enacted. The Board finds the following facts to be critical:

(a) Increased density production wells were first specifically authorized by the Utah Legislature in the 1983 Act. (See Utah Code Ann. Section 40-6-6(4) (Supp. 1990).) This Board's order dated April 12, 1985, in Cause No. 139-63 authorized the drilling of second wells for simultaneous production because it found that one well per drilling unit was not adequately draining the pool;

(b) The Miles 2-1B5 well was drilled as a second well under the Board's increased density order after 1983; and

(c) Prior to the above-stated events, this Board's order in Cause No. 139-13 would not have required modification because no additional wells could have been drilled.

14. S.H. Bennion has not entered into any prior agreement with consenting interest owners which supplants the statutory authority and duty of this board to impose costs as provided under § 40-6-6(6), Utah Code Ann. (1953, as amended).

15. That within the range of 150% to 200% of the mandatory non-consent penalty provided under § 40-6-6(6)(b), Utah Code Ann. (1953, as amended), there is sufficient evidence of risk incurred by the consenting owner that a penalty of 175% is appropriate.

CONCLUSIONS OF LAW

1. All interests in the subject drilling unit were force pooled by order of this Board as of July 26, 1979.

2. The Board has the necessary and inherent authority, pursuant to Utah Code Ann. §§ 40-6-1 and 40-6-6, (1953 as amended) to amend, modify or supplement its previous pooling orders where there has been a substantial change in circumstances or an omission in a prior order and where failure to modify the order would result in the continued enforcement of terms which are not just and reasonable or which would fail to protect correlative rights.

4. The relief ordered by the Board in this matter will prevent the drilling of unnecessary wells, prevent waste, and protect correlative rights.

Sufficient evidence now being available upon which to reach a decision, the Board issues the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. The order previously entered in Cause No. 139-13 is amended to provide that the consenting owners of the Miles 2-1B5 well shall be reimbursed from S.H. Bennion's share of costs out of the production from the unit attributable to S.H. Bennion's interests.

2. Consenting owners from the subject unit shall own and be entitled to receive all production from the Miles 2-1B5 well applicable to each tract or interest and obligations payable out of production until the consenting owners have been paid the amount due under the terms of this order relating to the subject drilling unit.

3. Each consenting interest owner in the unit will be entitled to receive, subject to royalty or other similar obligations, his or her share of production of the Miles 2-1B5 well applicable to their interest in the drilling unit and, its proportionate part of S.H. Bennion's share or such production until costs are recovered.

4. S.H. Bennion shall be entitled to receive, subject to royalty or similar obligations, his share of production from the Miles 2-1B5 well applicable to his interest in the subject drilling unit after the consenting owners have recovered from S.H. Bennion's share of production the following:

(a) 100% of S.H. Bennion's share as non-consenting owner of the cost of surface equipment beyond the well head connections plus 100% of the non-consenting owners share of the costs of operation of the well commencing with the first production and continuing until the consenting owners have retrieved these costs;

(b) 175% of that portion of the costs and expenses of staking the location, well-side preparation, rights of way, rigging up, drilling, re-working, deepening, or plugging back, testing, completing, and the cost of equipment in the well after deducting any cash contributions received by the consenting owners; and

(c) Interest on these amounts is to be assessed at the amount of the prime lending rate as periodically determined by Citibank of New York, NA, plus two percentage points.

(d) S.H. Bennion's interest not currently being subject to lease or other contract development

of oil and gas, S.H. Bennion is entitled to receive as royalty, the average landowner's royalty attributable to each tract within the subject drilling unit, effective as of the date prior to the commencement of the drilling of the well on the subject drilling unit.

5. To the extent that any previous order of the Board is inconsistent with this order, those orders are hereby vacated to the extent of such inconsistency.

6. The Board retains exclusive and continuing jurisdiction over all matters covered by this order and over all the parties affected thereby and particularly reserves exclusive and continuing jurisdiction to make further orders as appropriate and as authorized by statute and regulation.

DATED this 20th day of September, 1990.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING

JAMES W. CARTER
ACTING CHAIRMAN

Exhibit B to Addendum

BEFORE THE BOARD OF OIL, GAS AND MINING,

DEPARTMENT OF NATURAL RESOURCES

IN AND FOR THE STATE OF UTAH

IN THE MATTER OF THE APPLICATION OF S. E. BENNION FOR AN ORDER POOLING INTEREST IN THE DRILLING UNIT COMPRISED OF SECTION 1, TOWNSHIP 2 SOUTH OF RANGE 5 WEST, UINTAH SPECIAL MERIDIAN, DUCHESNE COUNTY, UTAH	ORDER Cause No. 139-13

This cause came on for hearing before the Board of Oil, Gas and Mining, Department of Natural Resources, the State of Utah, at 10:00 a.m., on Thursday, July 26, 1979, in the Executive Conference Room, Holiday Inn, 1659 West North Temple, Salt Lake City, Utah, pursuant to the Amended Application of S. E. Bennion ("Bennion") and to notice to all interested parties duly and regularly given by the Board, to consider forced pooling of the uncommitted interest of Bennion in the above-captioned drilling unit, and other matters as set forth in the Amended Application and Notice of Hearing.

The following members of the Board were present:

Charles R. Henderson, Chairman

Edward T. Beck

C. Ray Juvelin

E. Steele McIntyre

John L. Bell

Also present and representing the Division:

Cleon B. Feight, Director

Thalia R. Busby, Administrative Assistant

Frank M. Hamner, Chief Petroleum Engineer

EXHIBIT

Michael, Minder, Geological Engineer

Denise A. Dragoo, Special Assistant Attorney General

Appearances were made as follows:

S. H. Bennion, for himself

Peter Stirba, Counsel for S. H. Bennion

Don Gallion, Counsel for Shell Oil Company

Gregory P. Williams, Counsel for Shell Oil Company

This cause also came on for hearing before the Board of Oil, Gas and Mining, Department of Natural Resources, State of Utah, on October 24, 1979, at the Wildlife Resources Auditorium, 1596 West North Temple, Salt Lake City, Utah.

The following Board members were present:

Charles R. Henderson, Chairman

John L. Bell

C. Ray Juvelin

E. Steele McIntyre

Constance K. Lundberg

Edward T. Beck

Also present and representing the Division:

Cleon B. Feight, Director

Thalia R. Busby, Administrative Assistant

Frank M. Hamner, Chief Petroleum Engineer

Michael Minder, Geological Engineer

Denise A. Dragoo, Special Assistant Attorney General

Appearances were made as follows:

S. H. Bennion, for himself

Peter Stirba, Counsel for S. H. Bennion

Don Gallion, Counsel for Shell Oil Company

Gregory P. Williams, Counsel for Shell Oil Company

This cause also came on for hearing before the Board of Oil, Gas and Mining, Department of Natural Resources, State of Utah, on December 18, 1980, at the Wildlife Resources Auditorium, 1596 West North Temple, Salt Lake City, Utah.

The following Board members were present:

John L. Bell, Co-Chairman

Charles Henderson

Thadis W. Box

E. Steele McIntyre

C. Ray Juvelin

Also present and representing the Division:

Cleon B. Feight, Director

Ron Daniels, Coordinator

Mike Minder, Petroleum Engineer

Paula Frank, Secretary

Denise A. Dragoo, Special Assistant Attorney General

Appearances were made as follows:

Peter Stirba, Counsel for S. E. Bennion

Lowell Kirkpatrick, for Shell Oil Company

Gregory P. Williams, Counsel for Shell Oil Company

NOW, THERFORE, the Board, having considered the matters presented at said hearings and the remarks and the stipulations of counsel, now makes and enters the following:

FINDINGS

1. That due and regular notice of the time, place, and purpose of said hearings was given to all interested parties in the form and manner and within the time required by law.

2. That the Board has jurisdiction over the matters covered by the Amended Application and all of the parties interested therein, and has jurisdiction to make and promulgate the Order hereinafter set forth.

3. That Bennion is the record owner of an unleased, undivided one-fourth mineral interest in all oil, gas and minerals located in the NE¼ SW¼ and NW¼ SE¼ of Section 1, Township 2 South, Range 5 West, Uintah Special Meridian, Duchesne County, Utah.

4. That by Order in Cause No. 139-3, entered June 24, 1971, as amended by Order in Cause No. 139-8, entered September 20, 1972, the Board established said Section 1, Township 2 South, Range 5 West, Unitah Special Meridian, as a drilling and spacing unit for the production of oil, gas, and associated hydrocarbons from the spaced interval described in said orders; that Shell Oil Company has drilled the TEW 1-1B5 well in said Section 1 which is producing from said interval and is the permitted well for said drilling unit.

5. That said Section 1, Township 2 South, Range 5 West, Uintah Special Meridian, contains 678.2 acres; and that Bennion's interest in said drilling and spacing unit is a 2.948984 interest.

6. That Shell is the major working interest owner and is the sole operator within said drilling unit; and that Shell is willing to let Bennion share in the proceeds of production of said unit from first production.

7. That pursuant to the Board's Interim Order in this cause dated March 26, 1980, all interests in the drilling unit comprised of Section 1, Township 2 South, Range 5 West, Uintah

Special Meridian, in the Altamont Field of Duchesne County, Utah, were pooled for the development and operation of said drilling unit and for the protection of correlative rights, effective at 6:00 a.m., Mountain Daylight time, July 26, 1979.

8. That Bennion's proportionate share of the net revenue from the production of the subject well up to 6:00 a.m., Mountain Daylight time on July 26, 1979, is $72,222.41 which consists of the following:

Working Interest Accumulations

Revenue	
Oil	$101,608.86
Gas	3,482.23
Total	105,091.09
Expenditures	47,203.16
NET	$57,887.93

Royalty Interest Accumulations*

Oil	$13,872.44
Gas	462.04
Total	$14,334.48

Total Accumulations

Working Interest	$57,887.93
Royalty Interest	14,334.48
Total	$72,222.41

(*Based on a one-eighth cost free royalty, proportionately reduced, until payout. Upon payout this royalty merges with and is included in the working interest.)

9. That pursuant to the Board's Interim Order in this cause dated March 26, 1980, Shell paid the Division of Oil, Gas, and Mining the sum of $72,222.41 which sum was placed in a

six-month money market certificate as directed by counsel for Bennion and Shell; that the original certificate earned interest in the amount of $3,917.69; and that the original sum and interest were invested in a new certificate which bears interest at the rate of 13.519% and will mature on May 6, 1981.

10. That Bennion has conducted an audit of Shell's records relating to the subject well at Shell's offices in Houston, Texas, and has submitted a report relating to such audit to the Board.

11. That it is the practice of the industry to conduct an audit of an operator's records at the office where the operator maintains such records; and that there are standard accounting procedures in the industry relating to such audits.

ORDER

IT IS THEREFORE ORDERED BY THE BOARD:

1. That all interests in the drilling unit comprised of Section 1, Township 2 South, Range 5 West, Uintah Special Meridian, in the Altamont Field of Duchesne County, Utah, be and the same are pooled for the development and operation of said drilling unit and for the protection of correlative rights, effective at 6:00 a.m., Mountain Daylight time, July 26, 1979.

2. That the TEW 1-1B5 well located in said Section 1 is the permitted well for said drilling unit.

3. That Bennion is entitled to receive from Shell Bennion's proportionate share of production of oil, gas liquids, and natural gas in-kind produced from the subject well from and after 6:00 a.m., Mountain Daylight time, July 26, 1979, upon payment of Bennion's proportionate share of the monthly

operating expense of said well; that Shell will tender Bennion invoices for his proportionate share of the monthly operating expense in the same manner and in the same detail as if Bennion had signed the Operating Agreement in effect for said unit; that in the event Bennion fails to pay his proportionate share of the monthly operating expense within 15 days of invoice, Shell shall have a first and preferred lien on Bennion's interest in production and shall be entitled to withhold the amount of said production in an amount equal to Bennion's share of the operating expense plus interest at the prevailing rate until such payment is received; and that should such default continue for a period of ninety (90) days after receipt of invoice, Shell shall be entitled to retain Bennion's proportionate share of production to the extent of Shell's lien or to tender the production withheld pursuant to Shell's lien to Bennion and pursue other available legal remedies.

4. That Bennion's interest in said drilling unit is a 2.948984 interest.

5. That Bennion is not entitled to share in production occurring prior to 6:00 a.m., Mountain Daylight time on July 26, 1979, in-kind but is entitled to share in the proceeds of such production; that the amount to which Bennion is entitled with respect to production occurring prior to 6:00 a.m., Mountain Daylight time on July 26, 1979, is $72,222.41; and that the Board shall transfer ownership of the money market certificate purchased pursuant to the Interim Order dated March 26, 1980, to Bennion. In addition, Shell shall pay Bennion the sum of $2,504.00, representing interest at 6 percent per annum on Bennion's statutory royalty interest for the period from first production until the purchase of the original money market certificate.

6. That any further audit of Shell's records relating to the subject drilling unit which Bennion wishes to conduct

shall be performed at Bennion's expense at the location at which such records are kept; and that any such audit shall be conducted pursuant to the accounting procedures of the industry.

DATED this 30th day of June, 1981.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING

C. R. Henderson

Charles R. Henderson, Chairman

Edward T. Beck

John L. Bell

Thadis W. Box

E. Steele McIntyre

Robert R. Norman

Margaret Bird

Exhibit C to Addendum

BEFORE THE BOARD OF OIL, GAS AND MINING

DEPARTMENT OF NATURAL RESOURCES

STATE OF UTAH

IN THE MATTER OF THE AMENDED PETITION OF ANR LIMITED INC., ET AL. FOR AN ORDER MODIFYING PREVIOUS ORDERS WHICH ESTABLISHED DRILLING AND SPACING UNITS AND ANY OTHER ORDERS RELATING TO TEST WELLS FOR THE ALTAMONT, BLUEBELL AND CEDAR RIM-SINK DRAW FIELDS, DUCHESNE AND UINTAH COUNTIES, UTAH	:	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Docket No. 85-007 Cause No. 139-42

Pursuant to the Amended Notice of Hearing dated March 4, 1985 of the Board of Oil, Gas and Mining ("Board"), Department of Natural Resources of the State of Utah, said cause came on for hearing on Thursday, April 11, 1985 at 10:00 a.m. in the Board Room of the Division of Oil, Gas and Mining ("Division"), 355 West North Temple, 3 Triad Center, Suite 301, Salt Lake City, Utah.

The following members of the Board were present:

Gregory P. Williams, Chairman
James W. Carter
Charles R. Henderson
Richard B. Larson
E. Steele McIntyre
John M. Garr, having recused himself, did not participate

Mark C. Moench, Assistant Attorney General, was present on behalf of the Board.

Members of the Staff of the Division present and participating in the hearing included:

Dr. Dianne R. Nielson, Director
Ronald J. Firth, Associate Director
John R. Baza, Petroleum Engineer

Barbara W. Roberts, Assistant Attorney General, was present on behalf of the Division.

Appearances were made as follows: Petitioners ANR Limited, et al., by Frank Douglass, Esq. and Ray E. Langenberg, Austin, Texas; Robert G. Pruitt, Jr., Esq., Salt Lake City, Utah; Frank J. Gustin, Esq., Salt Lake City, Utah; Louis A. Posekany, Jr., General Counsel, and George W. Hellstrom, Esq., ANR Production Company; Phillip K. Chattin, General Counsel, Utex Oil Company; Hugh C. Garner, Esq., for Coastal Oil & Gas Corporation; Phillip William Lear, Esq., for Phillips Petroleum Company; Jeffrey R. Young, Esq., for Bow Valley Petroleum, Inc.; B. J. Lewis, Esq., Vice President, and Robert W. Adkins, Esq., Linmar Energy Corporation; Robert Buettner, Esq., Koch Exploration Company; Lane Jamison, Esq., Sonat Exploration Company; Victor Brown and Robert Brown, Utah Royalty Association; John Harja, Esq., Gulf Oil Corporation; Martin Seneca, General Counsel, Ute Indian Tribe; Assad M. Raffoul, Petroleum Engineer, Bureau of Land Management; John Chasel, on his own behalf; George Morris, Esq., Ute Distribution Corporation; Dr. Gilbert Miller, Conservation Superintendent, Amarada Hess Corporation; and L. A. Pike, Roosevelt, Utah, landowner.

Now therefore, the Board having considered the testimony of the witnesses, John C. Osmond, Petroleum Geologist; Clarke Gillespie, Petroleum Reservoir Engineer; and R. Thayne Robson, Economist, for Petitioners and B. J. Lewis, Vice President, and John W. Clark, Petroleum Engineer, for Linmar Energy Corporation, and the exhibits received at said hearing and being fully advised in the premises, now makes and enters the following:

FINDINGS OF FACT

1. Due and regular notice of the time, place and purpose of the hearing was given to all interested parties as required by law and the rules and regulations of the Board.

2. The Board has jurisdiction over the matters covered by said notice and over all parties interested therein and has jurisdiction to make and promulgate any order hereinafter set forth.

3. The Board has heretofore entered 640 acre drilling and spacing orders for the Lower Green River/Wasatch Formation in Causes No. 139-3, 139-4, 139-5, 139-8, and 139-17 (Altamont Field), Causes No. 131-11, 131-14, 131-24, 131-27, 131-32, 131-33, 131-34, 131-45 and 131-55, (Bluebell Field), and Causes No. 140-6 and 140-7 (Cedar Rim-Sink Draw Field) as to the following described lands:

UINTAH SPECIAL MERIDIAN

Township 1 North, Range 1 West
Sections: 19-36

Township 1 North, Range 2 West
Sections: 19-36

Township 1 North, Range 3 West
Sections 23-26, 35 and 36

Township 1 South, Range 1 East
Sections: All (except Roosevelt Unit)

Township 1 South, Range 2 East
Sections: 4-8,18-19, 30-31

Township 1 South, Range 1 West
Sections: All (except Roosevelt Unit)

Township 1 South, Range 2 through 4 West
Sections: All

Township 1 South, Range 5 West
Sections: 10-17, 20-36

Township 1 South, Range 6 West
Sections: 25-26, 35-36

Township 2 South, Range 1 through 2 East
Sections: All

Township 2 South, Range 1 through 6 West
Sections: All

Township 2 South, Range 7 West
Sections: 19, 30-36

Township 2 South, Range 8 West
Sections: 23-26, 31-36

Township 3 South, Range 3 West
Sections: 5-8, 17-20, 29-32

Township 3 South, Range 4 through 8 West
Sections: All

Township 4 South, Range 3 West
Sections: 5 and 6

Township 4 South, Range 4 West
Sections: 1-6

Township 4 South, Range 5 West
Sections: 1-6

Township 4 South, Range 6 West
Sections: 1-18

SALT LAKE MERIDIAN

Township 5 South, Range 19 East
Sections: 20-23, 26-29, 32-35

Township 6 South, Range 19 East
Sections: 3-5, 9, 10, 15, 16, 22, 27 and 34

4. In Cause No. 140-12, the Board authorized the drilling of test or second wells that may only be produced alternatively with the initial well on the same drilling unit.

5. The Lower Green River/Wasatch Formation underlying the subject fields constitutes a pool as that term is defined in Utah Code Ann. §40-6-2(9) (1953, as amended), and is a highly complex series of isolated and discontinuous beds of productive rock that are randomly distributed vertically over a several thousand feet thick interval. Normally, the productive beds are separate and distinct and not in communication with each other.

6. Many of the productive beds are not correlatable from well to well and will not afford communication between wells as close as 1000 feet. Of the productive beds that correlate, various geological factors prevent a significant number form communicating between wells within the same section.

7. Geologic and engineering information from initial unit wells and test wells show that a single well will not effectively drain the recoverable oil and gas underlying any given 640 acre spacing unit because the productive beds are too

small or have other limiting characteristics precluding effective and efficient drainage of the recoverable reserves underlying the unit.

8. Data from production logs and field performance show that test wells drilled under the Order in Cause No. 140-12 after 1978 have caused the recovery of substantial amounts of oil from separate and distinct productive beds and from previously undepleted productive beds, and that the drilling of additional wells on existing units will increase the ultimate recovery of oil from the subject fields.

9. The prohibition of simultaneous production from the initial well and test well on the same unit has caused the shutting in of wells with the potential to produce substantial amounts of additional reserves.

10. Each additional well drilled under this order will tap producing formations that are separate and distinct from and not in communication with any other producing formation and is not an unnecessary well.

11. In some areas of the subject fields, geologic, engineering, and economic factors justify drilling additional wells on existing units. In other areas, geologic, engineering and economic factors may not justify drilling additional wells on existing units.

CONCLUSIONS OF LAW

1. Due and regular notice of the time, place and

purpose of the hearing was given to all interested parties as required by law and the rules and regulations of the Board.

2. The Board has jurisdiction over the matters covered by said notice and over all parties interested therein and has jurisdiction to make and promulgate any order hereinafter set forth.

3. The Board is authorized to modify its previous orders to permit additional wells to be drilled within established units under Utah Code Ann. §40-6-6(4) (1953, as amended).

4. An order permitting (a) the drilling of additional wells on existing units as provided herein and (b) the simultaneous production of initial wells and additional wells will prevent the waste of hydrocarbons, prevent the drilling of unnecessary wells, and protect correlative rights.

ORDER

IT IS THEREFORE ORDERED:

To prevent waste of oil, gas and associated liquid hydrocarbons, to avoid the drilling of unnecessary wells, to protect correlative rights and to maintain, to the maximum extent practicable, drilling units of uniform size and shape for the promotion of more orderly development of the lands described in Finding of Fact No. 3 above, the following order is hereby promulgated to govern operations in said area effective as of April 12, 1985:

A. Upon the effective date any and all orders of the Board heretofore promulgated which are inconsistent with the orders herein set forth shall be and are hereby vacated to the extent inconsistent herewith.

B. Additional wells may be drilled, completed, and produced on established drilling units comprising government surveyed sections of approximately 640 acres (or other designated drilling units so long as such unit is at least 400 acres in size) to a density of no greater than two producing wells on each unit comprising a section (or other designated unit).

C. Additional wells may be drilled at the option of the operator of the unit, based upon geologic and engineering data for that unit which will justify the drilling of an additional well in order to recover additional oil, provided the additional well appears to be economically feasible.

D. Economically feasible means that a prudent operator would have a reasonable opportunity to recover the costs of drilling, completing, producing and operating the well, plus a reasonable profit.

E. It is not the intent of this order, in permitting additional wells to be drilled on established drilling units, to change or amend the existing contractual rights or relationships, express or implied, of any parties who share in production or the proceeds therefrom in the spaced area.

F. Any additional well must be located at least 1,320 feet from the existing well on the unit and not closer than 660

feet from the exterior boundary of the unit. No two wells may be drilled in any drilling unit within the same governmental quarter section or equivalent lot.

G. If an operator elects to initially complete a well solely within producing formations that are separate and distinct from and not in communication with any other producing formation, the operator will use reasonable precautions in order that such well is not completed in any producing formation that may be effectively drained by any other well.

H. Second or test wells drilled under previous orders as well as additional wells to be drilled under this order may be produced simultaneously with initial wells.

I. The Board retains exclusive and continuing jurisdiction of all matters covered by this order and of all parties affected thereby and particularly that the Board retains and reserves exclusive and continuing jurisdiction to make further orders as appropriate and authorized by statute and applicable regulations.

ENTERED this 17th day of April, 1985.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING

GREGORY P. WILLIAMS, Chairman

APPROVED AS TO FORM:

MARK C. MOENCH
Assistant Attorney General

ROOSEVELT UNIT

Uintah County, Utah

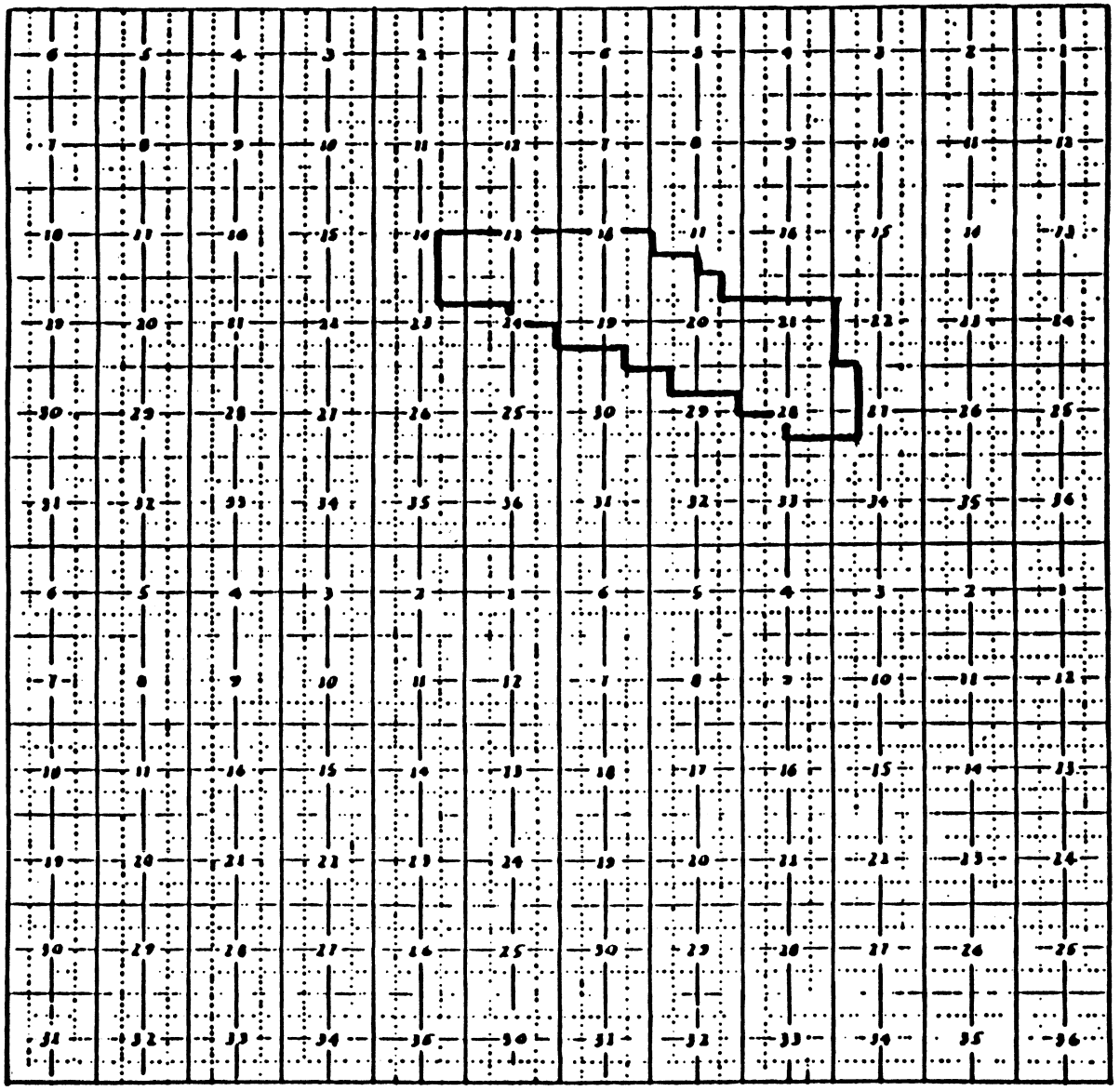

Exhibit D to Addendum

40-6-6. Drilling units — Establishment — Pooling of interests — Order — Operation.

(1) The Board of Oil, Gas and Mining, may order the establishment of drilling units covering any pool. All such orders shall be made upon terms and conditions that are just and reasonable. Drilling units shall be of uniform size and shape for the entire pool unless the board finds that it must make an exception due to geologic or geographic or other factors. When necessary the board may divide any pool into zones and establish drilling units for each zone, which units may differ in size and shape from those established in any other zone. The order shall include:

(a) the acreage to be embraced within each drilling unit and the shape of each drilling unit as determined by the board but the unit shall not be smaller than the maximum area that can be efficiently and economically drained by one well; and

(b) the direction that no more than one well shall be drilled for production from the common source of supply on any drilling unit, and the authorized location of the well.

(2) The board may modify the order to provide an exception to the authorized location of the well when the board finds such a modification to be reasonably necessary.

(3) An order establishing drilling units for a pool shall cover all lands determined by the board to be underlaid by the pool, and the order may be modified by the board to include additional areas determined to be underlaid by the pool.

(4) After an order fixing drilling units has been entered by the board, the drilling of any well into the pool at a location other than authorized by the order, is prohibited. The operation of any well drilled in violation of an order fixing drilling units is prohibited. The board may modify the order to decrease or increase the size of the drilling units or permit additional wells to be drilled within the established units.

(5) Two or more owners within a drilling unit may pool their interests for the development and operation of the unit. In the absence of voluntary pooling, the board may enter an order pooling all interests in the drilling unit for the development and operation. The order shall be made upon terms and conditions that are just and reasonable. Operations incident to the drilling of a well upon any portion of a unit covered by a pooling order shall be deemed for all purposes to be the conduct of the operations upon each separately owned tract in the unit by the several owners. That portion of the production allocated or applicable to each tract included in a unit covered by a pooling

order shall, when produced, be deemed for all purposes to have been produced from each tract by a well drilled thereon.

(6) Each pooling order shall permit the drilling and operation of a well on the drilling unit by any owner within the drilling unit, and shall provide for the payment of the costs, including a reasonable charge for supervision and storage facilities, as provided in this subsection.

In relation to each owner who refuses to agree to bear his proportionate share of the costs of the drilling and operation of the well (the nonconsenting owner), the order shall provide for reimbursement to the owner paying for the drilling and operation of the well (consenting owners) for the nonconsenting owner's share of the costs out of, and only out of, production from the unit attributable to his tract. The board is authorized to provide that the consenting owners shall own and be entitled to receive all production from the well, applicable to each tract or interest, and obligations payable out of production, until the consenting owners have been paid the amount due under the terms of the pooling order or order relating to the drilling unit. In the event of any dispute as to such costs, the board shall determine the proper costs. The order shall provide that each consenting owner shall be entitled to receive, subject to royalty or similar obligations, the share of the production of the well applicable to his interest in the unit, and, unless he has agreed otherwise, his proportionate part of the nonconsenting owner's share of such production until costs are recovered as provided in this subsection; and that each nonconsenting owner shall be entitled to receive, subject to royalty or similar obligations, the share of production from the well applicable to his interest in the unit after the consenting owners have recovered from the nonconsenting owner's share of production the following:

(a) In respect to every such well 100% of the nonconsenting owner's share of the cost of surface equipment beyond the wellhead connections (including, but not limited to, stock tanks, separators, treaters, pumping equipment, and piping), plus 100% of the nonconsenting owner's share of the cost of operation of the well commencing with first production and continuing until the consenting owners have recovered these costs, it being intended that the nonconsenting owner's share of these costs and equipment will be that interest which would have been chargeable to the nonconsenting owner had he initially agreed to pay his share of the costs of the well from the beginning of the operation; and

(b) An amount to be determined by the board but not less than 150% nor to exceed 200% of that portion of the costs and expenses of staking the location, wellsite preparation, rights-of-way, rigging up, drilling, reworking, deepening or plugging back, testing, and completing, and the cost of equipment in the well (to and including the wellhead connections), after deducting any cash contributions received by the consenting owners. A reasonable interest charge may be included if the board finds it appropriate.

(7) The order shall provide that:

(a) A nonconsenting owner of a tract in a drilling unit, which tract is subject to a lease or other contract for the development of oil and gas, shall have the costs provided in Subsection (6) paid from the production attributable to that tract. Any royalty interest or other interest not liable for the costs of production shall be paid by the nonconsenting owner and not from the production attributable to the tract until the consenting owners have recovered the costs as provided in Subsection (6).

(b) A nonconsenting owner of a tract in a drilling unit, which is not subject to a lease or other contract for the development of oil and gas, shall receive as a royalty the average landowners royalty attributable to each tract within the drilling unit, determined prior to the commencement of drilling and payable from the production allocated to each tract until the consenting owners have recovered the costs as provided in Subsection (6).

(8) The operator of a well under a pooling order in which there are nonconsenting owners shall furnish the nonconsenting owners with monthly statements of all costs incurred, together with the quantity of oil or gas produced, and the amount of proceeds realized from the sale of this production during the preceding month. If and when the consenting owners recover from a nonconsenting owner's relinquished interest the amounts provided for in Subsection (6) of this section, the relinquished interest of the nonconsenting owner shall automatically revert to him; and the nonconsenting owner shall from that time own the same interest in the well and the production from it, and be liable for the further costs of the operation as if he had participated in the initial drilling and operation. These costs are payable out of production unless otherwise agreed between the nonconsenting owner and the operator.

History: C. 1953, 40-6-6, enacted by L. 1983, ch. 205, § 1.